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ABSTRACT

The main question of this case is whether Allan Bakke was denied the equal protection of the laws in contravention of the 14th Amendment, solely because of his race, as the result of a racial quota admission policy. A statement of the case which reviews pertinent data such as the admission procedure of the medical school, Bakke's interview and rating, the special admission program, the proceedings in the trial court and an appeal are given. It is concluded that the special admission program violated Bakke's right to the equal protection of the law. The medical school's quota was said to up root individual constitutional freedoms and replace them with a destructive system of group rights. Furthermore, the court makes a distinction between quotas and the concept of affirmative action. It is concluded that Bakke's personal right to equal protection was violated. The California Supreme Court correctly decided this case when it considered this action to be a case of racial discrimination. The decision does not require a return to "all white" professional schools, but rather requires a search for alternate measures that do not violate constitutional rights. (AM)

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ED151482

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 76-811

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THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

vs.

ALLAN BAKKE,
Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF FOR RESPONDENT

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In the Supreme Court
OF THE
United States

October Term, 1977

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

vs.

ALLAN BAKKE,
Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 18 Cal.3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680. The modification of the opinion is reported at 18 Cal.3d 252b. The opinions, findings of fact and conclusions of law and judgment of the state trial court are contained in the Record filed with this Court[1] as follows: Notice of Intended Decision (R. 286-309), Addendum to Notice of Intended Decision (R. 381-

[1]Hereafter designated as "R".

385), Findings of Fact and Conclusions of Law (R. 386-392) and Judgment (R. 393-395).

JURISDICTION

The jurisdictional requisites are set forth in the Brief for Petitioner.

QUESTION PRESENTED

Is Allan Bakke denied the equal protection of the laws in contravention of the Fourteenth Amendment to the United States Constitution when he is excluded from a state operated medical school solely because of his race as the result of a racial quota admission policy which guarantees the admission of a fixed number of "minority" persons who are judged apart from and permitted to meet lower standards of admission than Bakke?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: ". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The primary issue in this case is whether the racial quota admission procedure employed by petitioner at the Davis Medical School ("the medical school") de-

nies Allan Bakke his right to the equal protection of the laws.[1]

Bakke's Application for Admission to the Medical School

Allan Bakke graduated from the University of Minnesota in 1962 with a Bachelor of Science degree in mechanical engineering. After receiving his degree, he did graduate work in mechanical engineering at the University of Minnesota for a year and then served for four years in the United States Marine Corps. While in the service, Bakke began to inquire about the possibility of attending medical school. After completing his military service, he attended Stanford University and, in June of 1970, received his Master of Science degree in mechanical engineering. While studying for his master's degree, and for some time thereafter, Bakke completed the various courses that are prerequisites to a medical education (R. 231-240).

Bakke's road to medical school has not been easy. As he told the admission committee:

> "In 1971 my continuously increasing interest in and motivation toward medicine became a firm decision and commitment. I have since completed the premedical course work, under conditions

[1]The complaint Bakke filed with the Yolo County Superior Court alleged that the special admission program violated his rights under the Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause of the California Constitution (Article I, Section 21) and Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d). The trial court found in Bakke's favor as to all three provisions. The California Supreme Court affirmed, relying exclusively on federal constitutional grounds. (Petition for Certiorari, Appendix [hereafter "Pet. App."] A, pp. 16a, 36a-37a; 18 Cal. 3d at 48, 62-63).

which I believe demonstrate the strength of my motivation and commitment to obtaining a medical education and becoming a physician. While employed full-time as an engineer, I undertook a near full-time course load of medical prerequisites—biology and chemistry. To make up class and commuting hours, I worked early mornings and also evenings at my job. This was an extremely taxing schedule in terms of time and effort, and involved a significant financial commitment as well. My desire to become a physician is further demonstrated by my involvement in recent months as a hospital emergency room volunteer. My experiences in this work have strongly reinforced my determination to become a physician.

Far from being wasted, I believe my engineering experience would help me to approach medical problems with insights different from those of most physicians. I strongly believe that my background in mathematics, computer programming, mechanical design and analysis could be usefully applied in medicine." (R. 233)[3]

[3]One of the medical school interviewers noted that Bakke's engineering background could be a great asset to his potential career in medicine:

"In the emergency room situation he [Bakke] has become aware of a number of instances in which a bit of expertise in mechanical engineering might be to some advantage to improving health care. For example, Dr. Alexander, the head of the [emergency room] complained that he had tried for some time to coax a hospital supply manufacturer to design a gurney upon which an emergency patient could be X-rayed without being moved from gurney to table. Bakke has begun to think about this and believes that he himself could come up with significant design if he had the chance . . . ." (R. 224-225)

Bakke's overall undergraduate grade point average (OGPA) was 3.51 on a scale of 4.0 (R. 239). His grade point average in the sciences (SGPA) was 3.45 *(Id.)*.[4] Upon graduation he was elected to Pi Tau Sigma, the national mechanical engineering honor society (R. 232).

Bakke took the Medical College Admissions Test (MCAT), which is divided into four sections (verbal, quantitative, science and general information) and is scored on a percentile basis. He scored in the 96th percentile (verbal), 94th percentile (quantitative), 97th percentile (science) and in the 72nd percentile (general information) (R. 239).

In 1973 and 1974 Bakke duly and timely submitted his application to the medical school for admission to the classes of 1977 and 1978, respectively (R. 387).

Admission to The Davis Medical School

Petitioner, faced with the annual task of selecting an entering class of 100 students, has established not one, but two, admission committees. For the most part, the committees act independently of one another, apply different standards to the particular candidates they judge and, ultimately, select students for the first year class whose qualifications differ markedly depending upon which committee considers their applications.

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[4]Bakke earned his undergraduate grades before the occurrence of the commonly referred-to phenomenon of "grade inflation". *See* Suslow, *Grade Inflation: End of a Trend?*, CHANGE, March, 1977 at 44-45.

One of these committees, the regular admission committee, selects 84 of the 100 members of the first year class. The other committee, known commonly as the "task force committee" or "special admission committee", selects the remaining 16 members and bases its selection upon substantially lower requirements than does the regular committee. The specific differences in the standards, and the results of their use, are discussed below.

The Regular Admissio[illegible]rocedure

The regular admission procedure is conducted as follows:

(1) To be considered for admission, a candidate must submit his application to the medical school between July and December of the academic year preceding the year for which admission is sought (R. 149, 248).

(2) Normally the regular admission committee reviews the applications to select certain individuals for further consideration. Once the committee has conducted this initial screening, the applicants selected are scheduled for personal interviews. The minimum standard adopted by petitioner provides that no student will be interviewed by the admission committee if he or she has an OGPA below 2.5 on a scale of 4.0. Applicants for "regular admission" who fall below the 2.5 "cut-off" mark are summarily rejected (R. 63, 150-151).

(3) In 1973, the interview procedure provided for one of the faculty members of the admission committee to interview each applicant. In 1974 applicants were interviewed twice, once by a fac-

ulty member and once by a student member of the committee (*Id.*).

(4) Following the interview, each applicant is rated by the various admission committee members. Taken into consideration for rating purposes are the interview summary prepared by the interviewer(s), the applicant's OGPA, SGPA, MCAT score and other biographical and background information in the applicant's file, such as a description of extracurricular activities, work experience, a personal statement of reasons for wanting to attend medical school, and letters of recommendation (R. 62-63, 155-159).

The committee members rate each applicant on a scale of from 0 to 100. The ratings are then added together and the applicant's total rating—in essence the admission committee's evaluation of his or her potential ability—is used as a "benchmark" in the selection of students (R. 63). In 1973 five committee members rated each applicant; thus, the highest possible rating for that year was a score of 500. In 1974 six committee members rated each applicant and the maximum possible total rating increased to 600 (*Id.*).

Bakke's Interview and Rating

In both 1973 and 1974 petitioner considered Bakke's application pursuant to the above-described procedure (R. 69, 389).

In 1973, Dr. Theodore H. West interviewed Bakke and concluded that:

"On the grounds of motivation, academic record, potential promise, endorsement by persons

> capable of reasonable judgments, personal appearance and demeanor, maturity and probable contribution to balance in the class I believe that Mr. Bakke must be considered as a very desirable applicant to this medical school and I shall so recommend him." (R. 225)

A summary of Dr. West's interview was circulated among the members of the admission committee. Bakke received a total rating of 468 out of a possible 500 (R. 180). Although Bakke's average rating was 93.6 out of a possible 100, petitioner rejected his application (R. 256).

Between the rejection of his 1973 application and his second application in 1974, Bakke wrote to Dr. George H. Lowrey, Associate Dean at the medical school and Chairman of the Admission Committee, protesting the medical school's admission program insofar as it purported to grant a preferential admission quota to members of certain racial and ethnic groups (R. 259).

After submitting his 1974 application, Bakke was interviewed twice. One interview was with Mr. Frank Gioia, a student member of the admission committee. Mr. Gioia found that Bakke "expressed himself in a free, articulate fashion", that he was "friendly, well tempered, conscientious and delightful to speak with", and concluded that, "I would give him a sound recommendation for [a] medical career." (R. 228-29) Mr. Gioia gave Bakke an overall rating of 94 (R. 230).

The second interview was with Dr. Lowrey, who, by coincidence, was the person to whom Bakke had writ-

ten in protest of the special admission program. Dr. Lowrey and Bakke discussed many subjects during the course of the interview, including the medical school's decision to grant a preferential admission quota to certain racial groups (R. 226). Apparently, they disagreed over the merits of that decision (*Id.*). In contrast to the two other persons who had interviewed Bakke, Dr. Lowrey found him "rather limited in his approach" to problems of the medical profession and said that, "the disturbing feature of this was that he had very definite opinions which were based more on his personal viewpoints than upon a study of the total problem." (R. 226) Dr. Lowrey gave Bakke an overall rating of 86 (R. 230).[3] Other members of the admission committee, after reviewing these interview summaries, as well as Bakke's overall file, rated him 96, 94, 92 and 87, for a total rating of 549 out of a possible 600; Bakke's average rating on his second application was 91.2 (*Id.*). Again, petitioner rejected his application (R. 273).

The Special Admission Program

At the same time as it administers and maintains the regular admission procedure at the medical school, petitioner also operates and maintains at Davis a "special admission program"[4] which, in petitioner's words, purports to "increase opportunities in medical education for disadvantaged citizens"

[3]Dr. Lowrey's complete interview summary is found at R. 226-227.

[4]Petitioner refers to the program as the "Task Force Program" (R. 195-196; Brief for Petitioner at 3).

(R. 193-96). Although the University originally declared that the program was for disadvantaged students regardless of race (R. 64-66, 86), no definition of the term "disadvantaged" has ever been formulated by the University (R. 163-64), the program has been heavily staffed with minority personnel (R. 162-63), and only minority applicants have been admitted to the medical school through the program (R. 168, 201-23 and 388).[1]

The special admission program is almost as old as the medical school itself. The school opened in 1968 and the program commenced only one year later, in September of 1969. Since that time, petitioner annually has set aside and alloted to the program 16% of the places in the first year class (R. 164, 168). On these facts, the state trial court concluded that the program constituted a formal racial quota (R. 388). The California Supreme Court, by a majority of 6-1, agreed (Pet. App. A, p. 39a; 18 Cal.3d at 64).

Petitioner administers the special admission program as follows:

(1) Applicants are asked to indicate on their applications whether or not they wish to be

[1] At trial and in the court below, petitioner denied that race was the pivotal factor in the special admission program (R. 30, 65, 75, 86). In light of the instant record, which confirms the existence of a formal racial quota at the medical school (R. 388, 390), it is interesting to note that in its 1973-1974 Bulletin, distributed to Bakke and other potential applicants, petitioner states without qualification that "[r]eligious preference and race are not considered in the evaluation of an applicant." 1973-1974 Bulletin, School of Medicine, University of California, Davis at 12.

considered for admission under the special admission program. The 1973 application form, prepared by the medical school, allowed an applicant to indicate whether or not he or she wished to be considered as an "economically and/or educationally disadvantaged" applicant. On the 1974 application form, prepared by the American Medical College Application Service (AMCAS) and used by slightly more than half of the medical schools in the country, the pertinent question asks: "Do you wish to be considered as a minority group applicant?" (R. 65-66, 146, 197, 232, and 292) According to petitioner's published admission statistics, the word "minority" includes "Blacks", "Asians", "Chicanos", and "American Indians" (R. 203-205, 216-218).

(2) Once an applicant has indicated a desire to be considered under the special admission program, his application is evaluated by a special subcommittee, separate from the regular admission committee (R. 65, 161-162, 388). This special subcommittee is composed of minority and non-minority faculty members, and students from minority backgrounds only (R. 162). It conducts a separate screening procedure, parallel to that of the regular admission committee (R. 64-66). The special subcommittee, however, is not bound by the medical school standard that no student will be interviewed if his OGPA is lower than 2.5. In 1973 and again in 1974, minority students were interviewed *and admitted* under the special admission pro- 19

gram even though they possessed OGPA's well below the 2.5 cut-off point. Minority students admitted under the special program possessed overall grade point averages as low as 2.11 in 1973 and 2.21 in 1974 (R. 210, 223).

(3) Following the interview, the special subcommittee assigns the various special applicants an overall personal rating, similar to the "benchmark" procedure of the regular admission committee (R. 66, 164-168). Finally, the special subcommittee recommends to the regular admission committee various candidates for admission to the medical school. *The recommendations continue to be made until the pre-determined quota of 16 is filled* (R. 168).

The Discriminatory Results of the Special Admission Program

According to statistics pubished by petitioner, the average applicant admitted under the special admission program possesses academic and other qualifications inferior to those of Bakke and of the average student admitted under the regular procedure (R. 388). The following chart compares Bakke's qualifications with those of applicants who are regularly admitted and with those of applicants admitted under the special admission program.

Class Entering in Fall, 1973

	SGPA[9]	OGPA[10]	MCAT Percentile[8] Verb.	Quan.	Sci.	Gen. Info.
Allan Bakke	3.45	3.51	96	94	97	72
Average of Regular Admittees	3.51	3.49	81	76	83	69
Average of Special Admittees	2.62	2.88	46	24	35	33

Class Entering in Fall, 1974

	SGPA	OGPA	MCAT Percentile Verb.	Quan.	Sci.	Gen. Info.
Allan Bakke	3.45	3.51	96	94	97	72
Average of Regular Admittees	3.36	3.39	69	67	82	72
Average of Special Admittees	2.42	2.62	34	30	37	18[11]

The above chart contains only statistics relating to grade point averages and MCAT scores. Also considered in the admission process, as previously mentioned, is the personal interview, which provides a further basis for the "benchmark" rating given each applicant. The benchmark rating takes into consideration the OGPA, SGPA, MCAT scores, the inter-

[8]The Medical College Admissions Test (MCAT), as noted previously, is subdivided into four sections: Verbal (Verb.), Quantitative (Quan.), Science (Sci.), and General Information (Gen. Info.).

[9]Undergraduate grade point average in science courses.

[10]Overall undergraduate grade point average.

[11]The figures contained in this chart for the special admittees, like the figures contained for the regular admittees, represent *average* scores and do not indicate the highest or lowest achievements of either group (R. 210, 223).

view summary and, *in addition*, other background data in the applicant's file, such as the particular details of a "disadvantaged" background (R. 63-66). Even with this rating procedure, designed to give the special applicants credit for overcoming "disadvantage", applicants admitted under the special program possessed overall ratings below those of students rejected under the regular admission procedure. Indeed, petitioner admits that some of the special admittees received overall ratings of as much as 30 points below Bakke's rating (R. 181, 388).

These facts establish that the special admission program is designed to grant, and in fact does grant, a preferential admission quota to members of certain racial and ethnic groups (R. 388-390). Petitioner never has defined the term "educationally disadvantaged", or the term "economically disadvantaged" (R. at 163-164). On the facts of this case, however, these terms are synonymous with "member of a minority group" for, as stated above, only minority applicants, and no non-minority applicants, are admitted to the medical school under the special admission program (R. 168, 201-223, 388).

Thus petitioner's special admission program is based upon race. The 16% allotment to the program of places in the first year class at the medical school constitutes a racial quota of 16%. Under the program, minority applicants are judged apart from and are allowed to satisfy lower standards than Bakke and other non-minority applicants; they are also guaran-

teed at least 16 places in each entering class (R. 164-168, 388, 390).

Proceedings in the Trial Court

Following the rejection of his 1974 application, Bakke instituted this action. Specifically, he alleged that he is qualified in every respect to attend the Davis Medical School; that petitioner, by virtue of its maintenance and operation of the special admission program, prevented him solely because of his race from competing for all of the available places at the medical school and thereby discriminated against him in violation of the Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause of the California Constitution (Article I, Section 21), as well as the Civil Rights Act of 1964 (42 U.S.C. § 2000d); and finally, that because of this unlawful discrimination, petitioner denied him admission to the medical school. Bakke prayed for the court to issue an Alternative Writ of Mandate, an Order to Show Cause, and to enter its judgment declaring that he is entitled to admission to the medical school and that petitioner is lawfully obligated to admit him (R. 1-5).

Petitioner denied the above allegations and cross-complained for a declaration as to the legality of the special admission program (R. 24-32).

On August 5, 1974 the trial court issued an Alternative Writ of Mandate, ordering petitioner to admit Bakke to the medical school or, alternatively, to

appear and show cause why the writ had not been complied with; at the same time, the court issued an Order to Show Cause, directing petitioner to appear before the court and show cause why it should not be enjoined *pendente lite* from refusing to admit Bakke to the medical school (R. 34-38).

On September 27, 1974 the trial court conducted a hearing on the Alternative Writ of Mandate and Order to Show Cause. Counsel for both parties stipulated that the hearing would also constitute a full trial of the case on the merits. Following oral argument, the trial court ordered the case submitted (R. 282).

On November 25, 1974 the court filed its Notice of Intended Decision, declaring that the special admission program is unlawful (Pet. App. D; R. 286-308).

Both parties prepared proposed Findings of Fact and Conclusions of Law, as well as a proposed Judgment (R. 315-380). Following a further hearing on the matter, held February 5, 1975, the trial court proceeded to draft its own Findings and Conclusions (R. 376). On March 7, 1975 the trial court filed an Addendum to the Notice of Intended Decision (Pet. App. E; R. 381-384); the court also filed its Findings, Conclusions and Judgment (Pet. App. F, G; R. 386-394).

The trial court specifically found as a matter of fact that:

> ". . . [T]he special admissions program purports to be open to 'educationally or economically disadvantaged' students. In the years in which [Bakke] applied for admission, the medical

> school received applications for the special admissions program from white students as well as from members of minority races, but no white students were admitted through this special program in either of said years. In fact no white student has been admitted under this program since its inception in 1969. In practice this special admissions program is open only to members of minority races and members of the white race are barred from participation therein. In each of the two years in which [Bakke] applied for admission [petitioner] set a pre-determined quota of 16 to be admitted through the special admissions program. This special admissions program discriminates in favor of members of minority races and against members of the white race, [Bakke], and other applicants under the general admissions program . . . ." (Pet. App. F, p. 114a-115a; R. 387-388)

The trial court concluded and rendered judgment that the special admission program at the Davis Medical School violated Bakke's rights under the Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause of the California Constitution (Article I, Section 21) and the Civil Rights Act of 1964 (42 U.S.C. §2000d) (Pet. App. F, p. 117a; R. 390, 394).

In paragraph 2 of the Judgment, the trial court ruled that:

> ". . . [Bakke] is entitled to have his application for admission to the medical school considered without regard to his race or the race of any other applicant, and [petitioner is] hereby restrained

> and enjoined from considering [Bakke's] race or the race of any other applicant in passing upon his application for admission . . . ." (Pet. App. G, p. 120a; R. 394)

The trial court also awarded Bakke his court costs, but refused to enjoin the operation of the special admission program or to order Bakke's admission to the medical school *(Id.)*.

Judgment was entered on March 7, 1975. Bakke's counsel then requested that petitioner consider the resubmission of Bakke's application for admission to the medical school pursuant to paragraph 2 of the Judgment. Petitioner's counsel responded that the University would consider such an application as it would "any other such application coming in at this late date." Petitioner's counsel later added that the medical school would only consider Bakke's application "in the normal course and without reference to Paragraph 2 of the Judgment . . . ." (R. 408-414).

Proceedings on Appeal

On March 20, 1975 petitioner filed a Notice of Appeal from those parts of the Judgment holding the special admission program unlawful, requiring petitioner to judge Bakke's application without regard to his race or the race of any other person, and awarding Bakke his costs of litigation (R. 398-399). On April 18, 1975 Bakke filed a Notice of Cross Appeal from that part of the Judgment denying his admission to the medical school (R. 417-418). Finally, while this case was pending in the California Court of Appeal

for the Third Appellate District, the Supreme Court of California granted the University's Petition for Transfer and accepted the case for direct review (R. 423-430; 436).

On September 16, 1976 the California Supreme Court issued its opinion in this case. The court, after reviewing the facts of the case and the importance of the constitutional questions presented for decision,[11] concluded that where the state has imposed a classification based upon race, ". . . not only must the purpose of the classification serve a 'compelling state interest' but it must be demonstrated by rigid scrutiny that there are no reasonable ways to achieve the state's goals by means which impose a lesser limitation on the rights of the group disadvantaged by the classification. The burden in both respects is upon the government." (Pet. App. A, pp. 17a-18a; 18 Cal.3d at 49).

The court assumed *arguendo* that some of the objectives of the special admission program "meet the exacting standards required to uphold the validity of a racial classification insofar as they establish a compelling governmental interest." (Pet. App. A, p. 23a; 18 Cal.3d at 53) The court, however, held that the University had not satisfied its burden of justifying the racial means employed to achieve the goals of the program.

> ". . . [W]e are not convinced that the University has met its burden of demonstrating that the basic goals of the program cannot be sub-

[11]Pet. App. A, pp. 1a-12a; 18 Cal.3d at 38-45.

> stantially achieved by means less detrimental to the rights of the majority." *(Id.)*

The court did not prevent the University from formulating a special admission program based upon other factors, such as disadvantage. Indeed, the court's opinion encourages such a procedure:

> "In short, the standards for admission employed by the University are not constitutionally infirm except to the extent that they are utilized in a racially discriminatory manner. Disadvantaged applicants of all races must be eligible for sympathetic consideration, and no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race. We reiterate . . . that we do not compel the University to utilize only 'the highest objective academic credentials' as the criterion for admission." (Pet. App. A, p. 25a-26a; 18 Cal.3d at 55 (footnote omitted))

The court did not guarantee that alternate measures would result in the enrollment of precisely the same number of minority students as under the racial quota (Pet. App. A, p. 26a-27a; 18 Cal.3d at 55-56). The court's conclusion was that the University had not established that the special admission program at issue "is the least intrusive or even the most effective means to achieve this goal." *(Id.* at 27a; 18 Cal.3d at 56)

The California Supreme Court also ruled that, insofar as Bakke's right to be admitted to the medical school is concerned, the University bears the burden of proving that Bakke would not have been admitted

had there been no racial quota (Pet. App. A, p. 38a; 18 Cal.3d at 63-64). The case was remanded to the trial court for the purpose of determining, under the proper allocation of the burden of proof, whether Bakke would have been admitted to the medical school absent this special admission program *(Id.)*."[13]

The University filed a Petition for Rehearing, which included a request for a stay, and it *stipulated* that, given Bakke's academic credentials and his high "benchmark" rating, *the University could not sustain its burden of proving that he would not have been admitted had there been no racial quota* (R. 487-488; *see generally Id.* at 445-490).

The California Supreme Court denied the Petition for Rehearing and denied the application for a stay (Pet. App. B; R. 494). In view of the University's stipulation, however, the court below modified its initial opinion to direct that Bakke be admitted to the medical school (Pet. App. C; R. 492-493; 18 Cal.3d 252b)."[14]

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[13]The court below was clearly correct on the burden of proof issue. Once the plaintiff makes out a *prima facie* case of racial discrimination, the burden of justifying the discrimination, and of explaining away the impact upon the plaintiff, shifts to the defendant. As this Court noted in Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 773, n. 32: "No reason appears . . . why the victim rather than the perpetrator of the illegal act should bear the burden of proof . . . ." *See also* Alexander v. Louisiana, 405 U.S. 625 (1972).

[14]The Brief of the National Conference of Black Lawyers as Amicus Curiae argues that the decision below should be vacated and remanded because of a recent amendment to the California Constitution. On November 2, 1976, approximately a month and a half *after* the state supreme court decided this case, the California Constitution was amended to provide, in part, that ". . .

SUMMARY OF ARGUMENT

The Fourteenth Amendment provides that no state shall deprive any person within its jurisdiction of the equal protection of the laws. In this case, the Court must decide whether Allan Bakke, a person within the jurisdiction of the state of California, was denied equal protection when petitioner excluded him from a state operated medical school solely because of his race.

Petitioner Violated Allan Bakke's Right to Equal Protection

Bakke was barred from the school as a result of a racial quota admission policy. The policy was imposed by petitioner at the Davis Medical School, an institution which had no prior history of racial discrimination. Pursuant to the quota policy, petitioner set aside 16 places in the first year class for members of certain racial and ethnic groups, and thereby prevented Bakke, who was not a member of one of the preferred groups, from competing for those places. The persons selected by the quota were judged by a separate admission committee which applied lower standards than were applied to Bakke.

[N]o person shall be debarred admission to any department of the University on account of race, religion, ethnic heritage, or sex." California Const., Art. IX, §9, Subd. f. Amicus asserts that "there is now available to Respondent the possibility of state relief for the action he brought in state court." Brief of the National Conference of Black Lawyers as Amicus Curiae at 27.

Amicus, however, ignores the fact that Bakke originally was rejected by the medical school *over three years before the amendment was adopted*. In California, state constitutional amendments are prospective in nature, unless a contrary intent clearly appears. *See* Hopkins v. Anderson, 218 Cal. 62, 66-67, 21 P.2d 560, 561 (1933); Rollins v. Wright, 93 Cal. 395, 29 P. 58 (1892). Thus, Amicus' argument is not pertinent.

The Supreme Court of California found that petitioner's quota system discriminated against Bakke because of his race and concluded that the quota violated Bakke's constitutional right to equal protection. This conclusion is entirely consistent with the clear mandate of the Fourteenth Amendment which, by its own terms, applies to "any person".

The previous decisions of this Court are authority for the conclusion of the court below. On more than one occasion, the Court has squarely held that the right to equal protection is personal in nature. Because state imposed racial discrimination is constitutionally suspect, persons victimized by it have always been afforded vigilant judicial protection; such discrimination is unlawful unless the government demonstrates that it is *strictly necessary to promote a compelling state interest.* In this instance, the concept of a "compelling" state interest is not synonymous with the recognition of an important social objective; it connotes a *degree* of importance that is so pressing as to override our traditional abhorrence of racial discrimination. These were the principles that the California Supreme Court applied in deciding this case.

Petitioner, however, asserts that the judgment below must be reversed because the protection granted by the Fourteenth Amendment does not apply to "any person" but, instead, covers only members of certain "discrete and insular" minority groups. According to petitioner, the instant preferential racial quota is "benign", and therefore legal, because it is designed to assist such minority groups, even though

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it excludes Allan Bakke from the medical school. Petitioner claims that Bakke is not entitled to judicial protection in this case because he is a member of the so-called "majority".

Petitioner's theory, if adopted, would fundamentally transform the right to equal protection. That right no longer would be available to every individual, but would depend upon the race of the person asserting it. Advancement by way of individual achievement would be replaced with the rule that rights and benefits can be awarded according to ancestry. Such a concept raises grave and troublesome questions of policy. Who is to be preferred, and by what standards are racial preferences to be judged?[15]

The ultimate fact is that a racial preference is not "benign", but an evil heretofore recognized by the American judicial system. The appropriate course for this Court to follow in this case is to reject petitioner's quota and to invoke the clear mandate of the Fourteenth Amendment.

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[15]The instant quota grants a preference to Blacks, Chicanos, Asians and American Indians. In DeFunis v. Odegaard, 82 Wash. 2d 11, 17-18 & n.3, 507 P.2d 1169, 1174 & n.3 (1973), *vacated as moot*, 416 U.S. 312 (1974), the special admission program favored Black Americans, Chicano Americans, American Indians and Philippine Americans, but did not prefer Asians. *See also* Hupart v. Board of Higher Education, 420 F. Supp. 1087, 1098 & n.31 (S.D.N.Y. 1976) [Blacks and Hispanics; Asians were not favored because they were considered part of the "majority"]; Flanagan v. President and Directors of Georgetown College, 417 F. Supp. 377, 382 (D.D.C. 1976) [preferred groups were Black Americans, Native Americans, Asian Americans and Spanish speaking Americans]; Lige v. Town of Montclair, 72 N.J. 5, 13-14, 367 A.2d 833, 837 (1976) [Blacks were the only preferred group]; Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 330, 348 N.E.2d 537, 541, 384 N.Y.S.2d 82, 86 (1976) [Blacks, Puerto Ricans, Mexican Americans and American Indians].

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The California Supreme Court Correctly Decided this Case

In addressing the issues presented by this case, the California Supreme Court was not unmindful of the ends sought to be achieved by petitioner. The court below accepted *arguendo* several of petitioner's goals, but rejected petitioner's preferential racial quota as an unconstitutional means to achieve those objectives. The court below noted that the record was devoid of any evidence that the instant quota was the least intrusive mechanism available to petitioner, or that petitioner had ever attempted any alternate measure.

Although the California Supreme Court disapproved of petitioner's quota, it left petitioner free to explore new and innovative admission policies. The only limitation placed upon petitioner was one consistent with the Constitution and the previous decisions of this Court: the University may not prevent an applicant such as Allan Bakke from attending the Davis Medical School solely because of his race.

The decision below is a practical and sensitive response to a complex social issue. It is clearly correct and should be affirmed by this Court.

ARGUMENT

INTRODUCTION

The question presented in this case is whether petitioner's special admission program, which excluded Allan Bakke from the Davis Medical School solely because of his race, denied Bakke the equal protection of the laws. This question, appropriately described by the court below as "sensitive and complex",[16] is of vital concern. It presents a constitutional conflict in which this Court must decide whether the right to equal protection, granted by the Fourteenth Amendment to "any person", does indeed extend to individuals such as Allan Bakke or, instead, applies only to protect certain racial and ethnic groups.

The issue is by no means new. It has attracted considerable attention,[17] evoked a wealth of comment,[18] and has been the focus of previous litigation.[19]

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[16] 18 Cal.3d at 38.

[17] Approximately 50 briefs amicus curiae have been filed herein.

[18] *See, e.g.*, Lavinsky, *A Moment of Truth on Racially Based Admissions*, 3 Hastings Const. L. Q. 879 (1976); Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 U.C.L.A. L. Rev. 343 (1974); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U.Chi. L. Rev. 723 (1974); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1. The discussion has gone beyond the law reviews. *E.g.*, *Sindler*, AMERICA IN THE SEVENTIES at 262-329 (1977); Glazer, AFFIRMATIVE DISCRIMINATION (1975); Cohen, *Race and the Constitution*, 220 THE NATION 135 (1975); Wilkins, *The Case Against Quotas*, ADL BULLETIN, March 1973, at 4. In the words of Mr. Justice Brennan: "[F]ew constitutional questions in recent history have stirred as much debate . . . ." DeFunis v. Odegaard, 416 U.S. 312, 350 (1974) (dissenting opinion).

[19] A similar claim was raised in the celebrated case of DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973), and in

Needless to say, the question demands careful review; but even cases involving broad constitutional questions are grounded in a factual record and it is there that the argument must begin.

I

THE SPECIAL ADMISSION PROGRAM VIOLATES ALLAN BAKKE'S RIGHT TO THE EQUAL PROTECTION OF THE LAWS.

A. The Nature Of The Special Admission Program.

1. The program is a racial quota.

There are 100 places in the first year class at the Davis Medical School. Under normal circumstances, Allan Bakke would be eligible to compete for all of those places. In this case, however, petitioner has formally adopted a preferential racial quota and has set aside 16 of the places for members of designated racial and ethnic minority groups. In so doing, petitioner has prevented Bakke, solely because of his race, from competing for the 16 quota places. Petitioner does not dispute this fact and, under the

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Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976).

The subsequent history of the *DeFunis* case, *cert. granted*, 414 U.S. 1038 (1973), *vacated as moot*, 416 U.S. 312 (1974), is well chronicled. *See, e.g., DeFunis Symposium*, 75 Colum. L.Rev. 483 (1975).

The *Alevy* case also suffered from procedural defects. In that case the court concluded that the plaintiff would not have been admitted to the school in question had there been no special program. "[T]hus," said the New York Court of Appeals, "the petition should be dismissed." 39 N.Y.2d at 338, 348 N.E.2d at 547, 384 N.Y.S.2d at 91.

There are no such procedural problems in this case.

burden of proof rule announced by the California Supreme Court, concedes that it cannot refute Bakke's claim that he would have been admitted to the medical school had there been no quota.[20]

Because the quota reveals the true nature of the special admission program, petitioner seeks to evade this aspect of the case. Petitioner asserts that there is no formal allotment of places to specific groups, but rather an admission "goal" which the school is attempting to achieve.[21] The record herein, however, establishes beyond doubt that the special admission program is in fact a racial quota. The Chairman of the Admission Committee testified:

> "Q. [Mr. Colvin] It answers it, except that I still have a curiosity, which you have perhaps answered but there was, correct me if I am wrong, under the faculty resolution you would continue to approve and process Task Force applications until 16 had been accepted?
>
> A. [Dr. Lowrey] That is correct, yes.
>
> Q. In the year 1972-73, were any of the [pupils] admitted through the Task Force procedure other than persons of minority ethnic identification?
>
> A. No.

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[20]R. 445; Brief for Petitioner at 7-8. Thus the California Supreme Court modified its opinion to read, in part:

> "However, on appeal the University has conceded that it cannot meet the burden of proving that the special admission program did not result in Bakke's exclusion. Therefore, he is entitled to an order that he be admitted to the University. . . . [T]he trial court is directed to enter judgment ordering Bakke to be admitted." 18 Cal.3d at 252b, 553 P.2d at 1172, 132 Cal.Rptr. at 700.

[21]Brief for Petitioner at 44-47.

Q. Your answer would be the same for the current year?

A. That is correct." (R. 168)

In administering its special admission program in such a manner, petitioner has transcended any fair interpretation of "affirmative action", and has entered a realm that is constitutionally forbidden. Although Allan Bakke was obviously qualified for the Davis Medical School, petitioner's quota arrangement excluded him, because of his race alone, from 16 of the 100 places in the first year class. Petitioner's quota sought out persons, regardless of their lower qualifications, who satisfied the school's racial preference."

"Petitioner filled its quota by seeking out persons with lower qualifications than Bakke, as revealed above in the chart and accompanying discussion comparing Bakke with regular admittees and with those admitted through the special admission program. *See* pp. 12-15, *supra*.

Several Amici claim that Bakke cannot force the University to rely on MCAT scores because the test is "culturally biased". *E.g.*, Brief for National Employment Law Project as Amicus Curiae at 10-16; Brief for Law School Admission Council as Amicus Curiae at 19; Brief for U.C.L.A. Black Law Students Association, *et al.*, as Amicus Curiae at 8 & n.10; *but see* Brief of Association of American Law Schools as Amicus Curiae at 12-17.

Bakke, however, has never contended that the school must use the MCAT as a measure of ability. The California Supreme Court certainly did not require its use. 18 Cal.3d at 55. It is *petitioner* who has chosen to rely on the test.

As to the claim of "cultural bias", we note that Amici have presented no evidentiary record in support of their position. Both the trial court and the California Supreme Court had no testimony or documentary evidence on the point.

Even former Justice Douglas, no great believer in so-called aptitude tests, stated clearly in *DeFunis* that:

> "The school can safely conclude that the applicant with a score of 750 should be admitted before one with a score of 500. The problem is that in many cases the choice

2. Petitioner's quota uproots individual constitutional freedoms and replaces them with a destructive system of group rights.

In attempting to justify the special admission program, petitioner has posed several familiar arguments. Petitioner's initial thrust is that the program here challenged is the *only* way the University can achieve its objectives. "There is," says petitioner, ". . . no substitute for the use of race as a factor in admissions . . . ."[23] Such a claim must be judged in terms of the record. When that is done, there is but one conclusion: the record does not support petitioner. There is simply no evidence in this case that the Davis Medical School has ever attempted any alternative to the quota.

The school opened in 1968. "In short order the faculty realized . . . that the existing admissions criteria failed to allow access for any significant number of minority students."[24] To compensate, petitioner established a racial quota. Petitioner made no attempt to convince the trial court that it could not meet its goals

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will be between 613 and 602 or 574 and 528." 416 U.S. at 329 (dissenting opinion).

The situation here, with Bakke scoring in the 96th, 94th, 97th and 72nd percentiles, and the special admittees *averaging* in the 46th, 24th, 35th and 33rd percentiles (1973) and in the 34th, 30th, 37th and 18th percentiles (1974), is far closer to the 750-500 situation posed by former Justice Douglas than it is to the 643-602 situation. Bakke is clearly better qualified. Parenthetically, we are hard pressed to understand how a mathematics or science question can be unfairly "culturally biased". *See* Linn, *Test Bias and the Prediction of Grades in Law School*, 27 J. Legal Educ. 293, 322-323 (1975); Hart & Evans, *Major Research Efforts of the Law School Admission Council*, Apr. 1976; *see also* Sedler, *Racial Preference, Reality and The Constitution: Bakke v. Regents of the University of California*, 17 Santa Clara L.Rev. 329, 350 (1977); Brief of Association of American Law Schools as Amicus Curiae, *supra*, at 12-17.

[23] Brief for Petitioner at 14.

[24] *Id.* at 2.

through another, less discriminatory, program. The plain fact is that petitioner has never tried any other measure; nor does it show any inclination to do so.[25]

Petitioner's other rationalizations respecting the merits of its program are blind to the inevitable detriment suffered by society whenever racial preferences exist. The mechanism of the quota has grave implications; the evil transcends an individual case of favored treatment, just as it goes beyond an individual case of personal discrimination. It implies that rights to education, training and consequent career opportunities, ideally open to all on an equal opportunity basis, will now be officially categorized by group membership. One would not become a doctor, lawyer, engineer or accountant, but a Black doctor, a Chicano lawyer, an Asian engineer, or an American Indian accountant. Admission to each profession or trade would be limited according to the relative size of each ethnic group.

There is an insoluble question of policy. Is every preferential racial-ethnic quota lawful? If so, then presumably a 100% quota (or an exclusionary rule close thereto) would be approved—and thus would stand outside the arena of judicial scrutiny. If, on the other hand, we are to accept only those quotas which are "reasonably" dictated by the motives of their authors, an opposite result follows: upon the adoption

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[25] *See* Lavinsky, *A Moment of Truth on Racially Based Admissions*, 3 Hastings Const. L. Q. 879 (1976). According to petitioner, if the judgment below is affirmed and the medical school cannot utilize a racial quota to govern its selection of students, the school "predictably . . . would simply shut down [its] special admission [program]" rather than pursue alternate measures that are less discriminatory. Brief for Petitioner at 14.

of each quota, the process of judicial review would begin anew, and the nation's courts would be called upon endlessly to judge the eligibility of specific minority groups, to apportion their shares of the benefit in question, and to rationalize and adjudicate the relative rights of each collective contestant. Upon what valid basis could such questions be considered?

> "Once race is a starting point educators and courts are immediately embroiled in competing claims of different racial and ethnic groups that would make difficult, manageable standards consistent with the Equal Protection Clause." *DeFunis v. Odegaard*, 416 U.S. 312, 333-334 (1974) (Douglas, J., dissenting).

There immediately arises the problem of numbers. A quota in proportion to the national population? The state population? The county or city population? If, for example, the Japanese population of the United States were one in 350, then would each professional school class have only one member of that group (and no more), given 350 places in the class? If the state had no significant Japanese population, then could no Japanese qualify?[25]

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[25]One observer queries:

> "What degree of minority representation is "reasonable?" It seems to depend on who is asked and on who makes the decision, rather than on any consensus as to the proper base for representation. . . . [I]n 1972, minority-student caucuses at the Berkeley Law School (University of California) demanded, in total, about half the entering places for minorities. Each minority group pressed a different formula: blacks insisted on a national proportional base, Chicanos on a California base and Asian-Americans on a local San Francisco Bay area base. In sum, how the base is determined in turn determines the proportion of the scarce resource the group can claim. Hence

There also arises the question of numerous groups not covered by petitioner's quota: Filipinos? Samoans? Hawaiians? Moroccans? Lebanese?" There are also a wide variety of ethnic sub-groups contained within the so-called "majority", who themselves have been disadvantaged or discriminated against in the past.[26]

Should a preferential quota be extended beyond national, ethnic, and racial groups to religious groups? If a religious group were deemed to be disadvantaged, would its members have special rights? Conversely, if it were deemed to be "not disadvantaged", would the group be subject to legally approved discrimination? For, given a limited number of opportunities, the granting of a preference to include a favored class of candidates surely implies a detriment—in the way of exclusion—to individuals who are not so treated.

And who is a member of a racial group? Need one be a "full-blooded" American Indian to qualify? Or is one grandparent sufficient? Or one great-grandpar-

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the process of deciding what base to use is typically highly political and intensely disputed." Sindler, AMERICA IN THE SEVENTIES at 306 (1977).

[27]"It is realistic to expect many more [such groups], because once this principle for the distribution of benefit appears operative each group is under some pressure to stake an early claim. The pressure is greater when it cannot be known in what fraction(s) the cake will be cut, so that restraint by any group may result in an ethnic apportionment on some continuum taking no account of that group whatever." Cohen, *Race and the Constitution*, 220 THE NATION 135, 142 (1975).

[28]*See* Lavinsky, *DeFunis v. Odegaard: The "Non-Decision" With a Message*, 75 Colum.L.Rev. 520, 527, n. 38; *cf.* Meyer v. Nebraska, 262 U.S. 390 (1922). To paraphrase the Supreme Court of New Jersey, "We are a [nation] of minorities." Lige v. Town of Montclair, 72 N.J. 5, 24, 367 A.2d 833, 843 (1976).

ent? Are we to become involved in the testing of legal rights according to blood lines?

The questions do not stop there. How extensive a preference should be granted? In this case it is sixteen places at the Davis Medical School. Why not eight, or thirty-two, or sixty-four, or some other number? What is the rational basis for any specific percentage?

For how long is the preference to be continued? And who shall decide when the preference is to be altered or concluded, and on what terms, and by what authority?[29]

These questions illustrate the dilemmas inherent in the quota system. While they might arise case-by-case in the context of heated litigation, their ultimate resolution would lie beyond the prayer of any individual claimant. We would be required to abandon the commitment to a society protective of individual achievement and replace it with a system of rights based upon racial or ethnic group membership.

The concept of individual freedom is based upon the concept of individual achievement. The counter principle is the principle of ascribing rights to individuals

[29]A peculiar aspect of petitioner's program is that it has not been authorized by statute, local ordinance, executive order, or a court of law. It has been imposed, instead, by a group of medical school faculty who decided on an *ad hoc* basis to apportion places in the first year class according to race.

Petitioner contends that the faculty has "independent discretion" in administering the special admission quota. Application for Stay at 11. The faculty, however, has set no time limit on the quota and during the eight years the program has been in operation, has made no change in the allotment of places. Indeed, the record discloses no procedure for altering or ending this racial preference.

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because of their ancestry, and that is the quota principle. It will be plainly destructive of a free society if this Court, which heretofore has condemned classifications based on race, were to abandon that wisdom and approve the quota system invoked herein by petitioner. Indeed, as the California Supreme Court observed: "No college admission policy in history has been so thoroughly discredited. . . .' 18 Cal.3d at 62.

3. There is a distinction between petitioner's quota and the concept of "affirmative action".

Several briefs amicus curiae urge the Court to validate petitioner's program because it constitutes "affirmative action".[30] There is, however, a well-accepted distinction between affirmative action and the imposition of a racial quota. In a broad sense, affirmative action relates to the positive effort undertaken by our society to integrate the races and provide all Americans with equal opportunities. To this end, government and private industry have promoted a variety of programs specially designed to identify, recruit, train and give experience to certain minority persons. A great many of these programs are governed by regulations promulgated pursuant to the Civil Rights Act of 1964.[31] As the Court noted in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Act was intended to pro-

[30] *E.g.*, Brief for The National Association of Minority Contractors, *et al.*, as Amicus Curiae at 13-27; Brief for Asian American Bar Association of the Greater Bay Area as Amicus Curiae at 21-23; Brief for the Bar Association of San Francisco, *et al.*, as Amicus Curiae at 40-48; Brief for National Fund for Minority Engineers as Amicus Curiae at 26-35.

[31] 42 U.S.C. §§2000a-h; *see, e.g.*, 45 C.F.R. §§80.1-80.13.

hibit racial discrimination; it was not designed to grant a racial preference to any person or group:

> "In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.
>
> * * *
>
> ". . . Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant." 401 U.S. 424, 430-1, 436.

The aim of affirmative action is to enable persons to advance in society on the basis of individual merit. Affirmative action programs thus are designed to prepare persons to compete on an equal basis for jobs, education and other social, cultural and economic opportunities. Such programs do not involve the substantive use of racial percentages because the programs do not vest a "group right" to racial proportionality."

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[33]Indeed, Section 703(j) of Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000e-2[j]) contains language which appears to prohibit the use of preferential racial quotas:

> "Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment

Although percentages and other statistics may play a role in evaluating the effectiveness of an affirmative action program, such evaluative devices should never replace the program itself. For example, one guideline for affirmative action states:

> "Use that quantitative measurement of progress as a *measurement* of the affirmative action programs, but not as a substitute for such programs. Measurement is one thing, rigid quotas, especially those which would require the automatic inclusion of members of one group to the exclusion of members of other groups, are a different thing.

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to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

An example of the legislative intent behind this provision is found in the following reply by Senator Humphrey to the charge that Title VII would allow quotas:

> "The Senator from Virginia is off on a rabbit hunt again, and I am not going to follow him through the sagebrush, but I would like to make an offer to him. If the Senator can find in Title VII—which starts on page 27, line 21, and goes all the way through page 50, line 25—any language which provides that an employer will have to hire on the basis of *percentage* or quota related to color, race, religion, or national origin, I will start eating the pages one after another, because it is not in there." 110 CONG. REC. 7420 (1964).

Title VI of the Act is to the same effect. Uzzell v. Friday, 547 F.2d 801 (4th Cir. 1977); Flanagan v. President and Directors of Georgetown College, 417 F.Supp. 377 (D.D.C. 1976); Anderson v. San Francisco Unified School District, 357 F.Supp. 248 (N.D. Cal. 1972); 45 C.F.R. §80.3. *See also* 110 Cong. Rec. 7207 (1964) (remarks of Senator Clark). As pointed out above (note 2, *supra*), Bakke pleaded Title VI as a separate ground for relief and the trial court ruled in his favor as to that aspect of the case (Pet. Apps. F, G, pp. 117a-118a, 120a; R. 390, 394).

Exclusionary quotas are based on the concept of heredity and as such do a disservice to the principle of affirmative action. . . ." STATEMENT OF HUMAN RIGHTS COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO, March 20, 1972."

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[33]The judiciary has recognized the distinction between "affirmative action" and the imposition of formal racial quotas. *E.g.*, Hupart v. Board of Higher Education, 420 F.Supp. 1087 (S.D.N.Y. 1976); Flanagan v. President and Directors of Georgetown College, 417 F.Supp. 377 (D.D.C. 1976); Anderson v. San Francisco Unified School District, 357 F.Supp. 248 (N.D.Cal. 1972); Lige v. Town of Montclair, 72 N.J. 5, 367 A.2d 833 (1976); Broidrick v. Lindsay, 39 N.Y.2d 611, 350 N.E.2d 595, 385 N.Y.S.2d 265 (1976). Given the serious dangers of the quota system, it is not surprising that these courts have rejected the quota concept.

The judiciary has permitted racial quotas only in the very limited instance where it confronts a recalcitrant employer who, although guilty of past racial discrimination, refuses to remedy the wrong. The quotas imposed have usually been of limited duration, confined to a specific group of persons victimized by the defendant, and subject to ongoing judicial supervision. *E.g.*, Carter v. Gallagher, 452 F.2d 315, *modified on reh. en banc*, 452 F.2d 327 (8th Cir. 1972). Even under such circumstances, not all courts agree that racial quotas are a proper remedy. *E.g.*, EEOC v. Sheet Metal Workers Local 28, 532 F.2d 821 (2d Cir. 1976); Kirkland v. Department of Correctional Services, 520 F.2d 420, *reh. en banc denied*, 531 F.2d 5 (2d Cir. 1975), *cert. denied*, 97 S.Ct. 73 (1976); Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976); Commonwealth of Pennsylvania v. Glickman, 370 F.Supp. 724 (W.D.Pa. 1974); Harper v. Mayor and City Council of Baltimore, 359 F.Supp. 1187 (M.D.Md.), *modified on other grounds and aff'd sub nom.*, Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973).

In this case, the situation is far different from that in cases like *Carter*. Petitioner has denied consistently that it engaged in previous racial discrimination. Petitioner's Reply Brief for Certiorari at 6-7. Contrary to the claims of several amici, the court below found no evidence in the record to indicate the University had discriminated against minority applicants in the past. 18 Cal. 3d at 59-60. In addition, the instant quota has not been imposed for a limited duration; the University desires to continue this "experiment" for "a generation or two." Brief for Petitioner at 43 & n.42. Finally, the University argues that its quota should not be subject to judicial review; such control would be "stultifying." *Id.* at 76.

The distinction between affirmative action and the use of a rigid percentage formula is important to the resolution of this case. The question presented herein is not so broad as to involve the constitutionality of affirmative action. The issue is more limited; it concerns the legality of petitioner's special admission program which, as noted, utilizes a racial quota to govern entrance to professional school.

4. The constitutionality of petitioner's quota is subject to judicial review.

Petitioner seeks to minimize the Court's power of review by claiming that this case is a simple matter of the medical school using its best judgment in an attempt to achieve educational policy objectives.[34] Petitioner asserts that its admission procedure is so privileged and internal a process that the judiciary cannot intrude therein except in "rare instances when circumstances compel it."[35] Once the racial nature of petitioner's special program emerges, however, it becomes clear that the Court has a proper role in reviewing the constitutionality of that program.

Although petitioner does have wide discretion and must be selective in choosing its students from among the various persons who apply for admission, petitioner's discretion ends where constitutional violations begin. *E.g., Sweatt v. Painter*, 339 U.S. 629 (1950). This Court has consistently intervened in local educational programs to enforce constitutional rights, particularly the right to equal protection. *E.g., McLaurin*

[34]Brief for Petitioner at 75-76.
[35]*Id.* at 76.

v. Oklahoma State Regents, 339 U.S. 637 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

The decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) does not restrict the Court's power of review. In *Swann*, the Court reviewed a District Court order designed to integrate an elementary school system. The order called for the busing of white students and included the use of racial ratios. The Court found the order to be proper. The case is distinguishable from this one because ". . . there is a crucial difference between the policy suggested in *Swann* and that under consideration here: the *Swann* policy would impinge on no person's constitutional rights, because no one would be excluded from a public school and no one has a right to attend a segregated public school."[36]

Moreover, in *Swann* the Court clearly indicated that the use of a racial ratio is to be "no more than a starting point . . . rather than an inflexible requirement." 402 U.S. at 25. The Court also cautioned: "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." 402 U.S. at 24; *see also Milliken v. Bradley*, 45 U.S.L.W. 4873, 4878-4879 (U.S. June 27, 1977).

[36] DeFunis v. Odegaard, 416 U.S. 312, 336, n.18 (Douglas, J., dissenting).

In the instant case, petitioner has imposed a fixed racial quota and thereby has excluded Allan Bakke from entering the Davis Medical School. The court below properly recognized the clear distinction between *Swann* and this case. 18 Cal.3d at 46.

In considering Allan Bakke's claim of constitutional violation, however, it should be borne in mind that he does not contend that he has a constitutional right to attend medical school. His claim is the right not to be discriminated against because of his race. That right is founded in the Fourteenth Amendment and is subject to the greatest judicial protection.

B. The Special Admission Program Deprives Allan Bakke Of Equal Protection.

1. The rights granted by the Fourteenth Amendment are personal in nature.

The Fourteenth Amendment provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. Althougl this provision was ratified by the states shortly after the Civil War and at that time was interpreted as basically protecting Black persons,[37] the doctrine of equal protection is not bound by post-Civil War politics. As Mr. Justice Douglas has observed, the Equal Protection Clause is:

> ". . . not shackled to the political theory of a particular era. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 669 (1966).

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[37]Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

Thus courts have construed the Equal Protection Clause to protect individuals against state imposed racial discrimination in a variety of contexts. *E.g., Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Oyama v. California,* 332 U.S. 633 (1948); *Hernandez v. Texas,* 347 U.S. 475 (1954).[38]

While the protection afforded by the Fourteenth Amendment has expanded greatly since that provision was added to the Constitution, certain basic principles remain entrenched. One of these principles is that the rights granted by the Fourteenth Amendment are *personal* in nature. This concept was first enunciated over 90 years ago in the famous case of *Yick Wo v. Hopkins, supra,* 118 U.S. 356. In *Yick Wo,* the injured party was entitled to equal protection, not because he was a member of a group preferred by the Fourteenth Amendment, but because he was an individual, *a person,* who had been discriminated against because of his race. The Court declared:

> "[The Fourteenth Amendment] says: 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons

[38]The Court has also held that the Equal Protection Clause protects individuals from state action which encroaches upon certain "fundamental rights". *E.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969) [right to travel]; Reynolds v. Sims, 377 U.S. 533 (1964) [right to vote]; Griffin v. Illinois, 351 U.S. 12 (1956) [right to transcript in criminal appeal]; Skinner v. Oklahoma, 316 U.S. 535 (1942) [right to procreate].

> within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . . ." 118 U.S. at 369.

More recent cases have not varied from this rule. *E.g., Sweatt v. Painter, supra,* 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents, supra,* 339 U.S. 637 (1950); *Sipuel v. Board of Regents, supra,* 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada, supra,* 305 U.S. 337 (1938). Indeed, in the case of *Shelley v. Kraemer,* 334 U.S. 1 (1948), this Court explicitly stated the doctrine that underlies the Equal Protection Clause. The Court said:

> "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are *personal* rights." 334 U.S. at 22 (emphasis added).

As former Justice Douglas commented in *DeFunis:*

> "There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he has a constitutional right to have his application considered on its individual merits in a racially neutral manner." *DeFunis v. Odegaard,* 416 U.S. 312, 337 (1974) (dissenting opinion).[39]

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[39]Justice Douglas also observed that:

> "A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end may produce that result despite its contrary intentions. One other assumption must be clearly disapproved: that blacks or browns cannot make it on their individual merit.

The court below heeded these principles and applied them to the facts of this case. The court held that the Equal Protection Clause, which by its own terms applies to "any person", means what it says and that "its lofty purpose, to secure equality of treatment to all, is incompatible with the premise that some races may be afforded a higher degree of protection against unequal treatment than others." 18 Cal.3d at 51.

This Court has never held that the standard of review in racial discrimination cases varies depending upon the asserted purposes of the discrimination, or the race of the person discriminated against. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer, supra,* 334 U.S. at 22. The Court's recent decision in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), squares with this policy. The Court there held that Title VII of the Civil Rights Act of 1964[40] and the Civil Rights Act of 1866[41], provisions that parallel the Fourteenth Amendment, prohibit racial discrimination against all persons on the same terms.[42]

That is a stamp of inferiority that a State is not permitted to place on any lawyer." DeFunis v. Odegaard, 416 U.S. at 343 (dissenting opinion). *See* Sowell, BLACK EDUCATION, MYTHS AND TRAGEDIES at 292 (1972); *see also Note*, Reverse Discrimination, 16 Washburn L.J. 421 (1977).

[40]42 U.S.C. §2000e.

[41]This provision was re-enacted as part of the Civil Rights Act of 1870 and presently is codified as 42 U.S.C. §1981.

[42]The brief amicus curiae filed by the NAACP Legal Defense and Educational Fund, Inc. argues to the contrary. Amicus argues that the "often Delphic" legislative history of the Fourteenth Amendment is squarely controlling here and legitimizes the provision of "educational benefits to blacks but not to whites." Brief of

2. Allan Bakke's personal right to equal protection has been violated.

Bakke's personal rights under the Fourteenth Amendment are not unlimited. Certain state imposed discrimination, for example, is routinely upheld if it is rationally related to a legitimate governmental objective. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).[53] If, however, such discrimination affects a fundamental right[54] or is based upon a suspect classification, such as race, it must meet a more rigorous test—a test of strict judicial scrutiny. *Loving*

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the NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae at 7.

The "legislative history" of the Fourteenth Amendment is not what Amicus claims it to be. The wide-ranging congressional debates over the Amendment have prevented some historians from pinpointing a precise "intent" behind the provision (*e.g.*, Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955)), and have led still others to suggest that the intent of the 39th Congress was far different from that represented by Amicus. *E.g.*, Dixon, *The Supreme Court and Equality: Legislative Classifications, Desegregation, and Reverse Discrimination*, 62 Cornell L. Rev. 494, 495 (1977). Another factor, not cited by Amicus, further complicates the analysis: the Fourteenth Amendment was debated not only by the Congress, but also by the independent legislatures of thirty-six states.

Not surprisingly, this Court has consistently found that although these historical sources, "cast some light", they are not determative. "At best, they are inconclusive." Brown v. Board of Education, 347 U.S. 483, 489 (1954); Loving v. Virginia, 388 U.S. 1, 9 (1967).

Amicus has presented nothing to alter this finding. Although Amicus has selected and reviewed various measures considered by the Congress at the time of the enactment of the Fourteenth Amendment, Amicus has not seriously considered the Civil Rights Act of 1866, a provision which clearly parallels the Fourteenth Amendment. Nor does Amicus cite this Court's recent decision in *McDonald* which, as we have mentioned above in text, holds that the 1866 Act (42 U.S.C. §1981) protects persons of all races to the same degree. 427 U.S. at 285-296.

[53] *Accord:* Williamson v. Lee Optical Company, 348 U.S. 483 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

[54] Cases cited note 38, *supra*.

v. Virginia, 388 U.S. 1 (1967). Under the strict scrutiny standard of review, a discriminatory classification is unconstitutional, and hence illegal, unless the government proves that it is *strictly necessary to promote a compelling state interest. E.g., Shapiro v. Thompson*, 394 U.S. 618 (1969). As the Court noted in *Dunn v. Blumstein*, 405 U.S. 330, 342-343 (1972):

> "In sum, durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are '*necessary* to promote a *compelling* governmental interest.' . . .
>
> "It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision', *NAACP v. Button*, 371 U.S. 415, 438 (1963); *United States v. Robel*, 389 U.S. 258, 265 (1967) and must be 'tailored' to serve their legitimate objectives. *Shapiro v. Thompson, supra*, at 631. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)."

The most onerous form of official discrimination is that which is based upon race. *McLaughlin v. Florida*, 379 U.S. 184 (1964). For that reason, racial dis-

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crimination has always been subject to the most rigid judicial scrutiny. *E.g., Kramer v. Union Free School District,* 395 U.S. 621, 628, n. 9 (1969); *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 668 (1966); *Takahashi v. Fish & Game Commission,* 334 U.S. 410, 420 (1948); *Oyama v. California,* 332 U.S. 633, 640 (1948).

Nearly a generation ago, this Court ruled that the exclusion of a black applicant from a state university solely because of his race was a violation of the Equal Protection Cla[illegible] *Sweatt v. Painter, supra,* 339 U.S. 629 (1950). Ever since, the unvaried holding of this Court's decisions and the teaching of contemporary history have been the same: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong and destructive of a democratic society.

> "Over the years, this court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving v. Virginia, supra,* 388 U.S. 1, 11 (1967); *see also McLaughlin v. Florida, supra,* 379 U.S. 184 (1964).

In the present controversy, petitioner asks that these lessons be unlearned. Petitioner maintains that equal protection is not a fundamental right, but rather, "only a question of whose ox is gored." *See* Bickel, THE MORALITY OF CONSENT at 133 (1975). In cases involving laws that discriminate against "discrete and insular" minority groups, the University

would label the discrimination "invidious" and have courts apply the traditional strict scrutiny test. But, says petitioner, when racial discrimination benefits minorities, even though simultaneously penalizing non-minority persons, a different rule should govern; such "benign" discrimination should be upheld if it is rationally related to a legitimate legislative objective.

The instant quota, however, is by its very nature "invidious". As one commentator notes:

> "Invidious distinctions are those tending to excite ill will, or envy, those likely to be viewed as unfair--and that is what racial classifications are likely to do and be when used as instruments for the apportionment of goods or opportunities." Cohen, *Race and the Constitution,* 220 THE NATION 135, 140 (1975).

Indeed, no precedent supports petitioner's view.[45] The Equal Protection Clause does not expand and contract depending upon the purpose behind racial

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[45]Petitioner's reliance on Katzenbach v. Morgan, 384 U.S. 641 (1966), Lau v. Nichols, 414 U.S. 563 (1974), and Morton v. Mancari, 417 U.S. 535 (1974), is misplaced.

Neither *Katzenbach* nor *Lau* involved a fixed preferential racial quota. Indeed, the classifications drawn in those cases were not based solely upon race, but were directed to the language difficulties of the persons in question. Moreover, the benefits that were extended in those cases did not result in anyone being deprived of his vote (*Katzenbach*) or his place in a public school (*Lau*).

In *Morton*, the Court considered an employment preference granted to "qualified Indians" by the Bureau of Indian Affairs (BIA). The Court expressly stated that it did not view the case as involving racial discrimination or a racial preference. The Court upheld the preference at issue, emphasizing the unique role accorded by the Constitution to the federal government in dealing

discrimination. If it did, constitutional guarantees would "acquire an accordionlike quality." *DeFunis v. Odegaard*, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting). In *DeFunis*, the Washington Supreme Court rejected a similar contention:

> "... [T]he minority admissions policy is certainly not benign with respect to nonminority students who are displaced by it ....
>
> "The burden is upon the law school to show that its consideration of race in admitting students is necessary to the accomplishment of a compelling state interest." *DeFunis v. Odegaard*, 82 Wash.2d 11, 32, 507 P.2d, 1169, 1182 (1973), *vacated as moot*, 416 U.S. 312 (1974).

Despite the obvious adverse effect of the special admission program upon Bakke, the University claims that he needs no judicial protection. Petitioner says that "[t]he injury to [Bakke] is an isolated incident in his life."[6] Petitioner asserts that Bakke, as a mem-

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with Indian tribes. The Court compared the preference to the constitutional requirement that a Senator be a resident of the state from which he is elected:

> "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. . . . In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *sui generis*." 417 U.S. at 554.

For a discussion of these cases and the problems presented by flat racial preferences, see Novick & Ellis, *Equal Opportunity in Educational and Employment Selection*, 32 AMERICAN PSYCHOLOGIST 306 (1977).

[6]Brief for Petitioner at 72; *see generally id.* at 71-73. This argument, as well as petitioner's claim that the present quota system is only temporary in nature, ignores reality. Petitioner has placed no time limit on the quota and admits (perhaps

ber of the so-called majority, has "life-or-death control over the special-admissions program."[57] The record is totally barren of any evidence to support such an argument. Bakke certainly has not chosen to discriminate against himself. It is a state operated medical school which has made that decision. To say that Allan Bakke should resort to the political process for protection is unrealistic insofar as Bakke the individual is concerned, and is wrong insofar as the Constitution is concerned.

Allan Bakke has brought this lawsuit on his own behalf. He claims membership in no group, and represents no class of litigants. He desires to be a physician and he seeks enrollment at the Davis Medical School. He asks only that his application be considered in a racially neutral manner. To tell him at this time that he should stop suing and start campaigning is to tell him to forget entirely about a career in medicine.

Moreover, the University's depiction of "Respondent's group" as a unified block possessing immense

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indirectly) that Allan Bakke must relinquish his rights and the position he has earned for "a generation or two". Brief for Petitioner at 42-43 & n. 53; *see also Id.* at 60, 79.

Allan Bakke is now 37 years old. He can hardly afford to wait as long as petitioner's "plan" calls for. The instant quota, if upheld, will force him to wholly abandon career objectives which he has actively pursued for a good portion of his life. As this Court stated in Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 352 (1938): ". . . [W]e cannot regard the discrimination as excused by what is called its temporary character."

The argument that Bakke could have sought admission to another medical school (Brief of NAACP as Amicus Curiae at 16-17) was also rejected in *Gaines, supra,* 305 U.S. at 350.

[57] Brief for Petitioner at 73.

political power"[9] is at odds with reality. As one writer so aptly states:

> "The argument that a racial classification which discriminates against white people is not inherently suspect implies that the white majority is monolithic and so politically powerful as not to require the constitutional safeguards afforded minority racial groups. But the white majority is pluralistic, containing within itself a multitude of religious and ethnic minorities—Catholics, Jews, Italians, Irish, Poles—and many others who are vulnerable to prejudice and who to this day suffer the effects of past discrimination. Such groups have only recently begun to enjoy the benefits of a free society and should not be exposed to new discriminatory bars, even if they are raised in the cause of compensation to certain racial minorities for past inequities." Lavinsky, *DeFunis v. Odegaard: The "Non-Decision" With a Message*, 75 Colum.L.Rev. 520, 527 (1975).

It is the judiciary, and not the ballot box, which is the final arbiter of constitutional rights. This Court's holding in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), is squarely on point:

> "One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." 319 U.S. at 638.[9]

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[9] *Id.*

[9] This principle clearly applies to the right to equal protection: "No plebiscite can legalize an unjust discrimination." Hall v. St. Helena Parish School Board, 197 F.Supp. 649, 659 (E.D.La.

Thus, when an individual such as Allan Bakke is discriminated against because of his race, he must not be deprived of judicial protection because he is a member of the "majority".[59] Under the Fourteenth Amendment, racial discrimination is inherently suspect regardless of the purpose of the discriminator or the identity of the person victimized. It has always been subject to strict judicial scrutiny and is illegal unless the government demonstrates that the end sought to be achieved is a *compelling state interest* and, further, that the discrimination employed is *strictly necessary* to promote such an objective.

1961), *aff'd per curiam*, 368 U.S. 515 (1962). *See also* Boson v. Rippy, 285 F.2d 43, 45 (5th Cir. 1960).

[59]Petitioner, relying on United Jewish Organizations v. Carey, 97 S.Ct. 996 (1977), argues that the special admission program does not exceed the bounds of constitutionality because it does not "fence out" white applicants from the medical school. The argument cannot withstand analysis. *Carey* involved the validity of a redistricting plan adopted by local authorities pursuant to the Voting Rights Act of 1965 (42 U.S.C. §1973). The plan was challenged on the ground that it violated a particular *community's* right to vote and be represented in the legislature. In upholding the plan, the Court specifically found that the plaintiff group would be neither disenfranchised nor unrepresented as a result of the redistricting. 97 S.Ct. at 1010.

In this case, however, the rights at stake are far different. Allan Bakke does not seek to elect someone to represent him in the Davis Medical School. He is associated with no group. He desires to personally pursue his career objectives and he has, indeed, been "fenced out" of doing so by petitioner's quota.

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II

THE CALIFORNIA SUPREME COURT CORRECTLY DECIDED THIS CASE.

A. The Court Below Properly Considered This Action To Be A Case Of Racial Discrimination.

The California Supreme Court decided this case by properly applying the basic concepts of equal protection outlined above. The court below readily perceived this action as a case of racial discrimination. "It is plain," said the court, "that the special admission program denies admission to some white applicants solely because of their race." 18 Cal.3d at 47 (footnote omitted). The court below also found, as did the trial court, that according to the University's own standards, Allan Bakke was better qualified than persons admitted under the program. "The question we must decide is whether the rejection of better qualified applicants on racial grounds is constitutional." 18 Cal.3d at 48.[51]

B. The Court Below Correctly Applied The Appropriate Judicial Standards In Judging the Constitutionality of Petitioner's Quota.

In reaching the constitutional question, the California Supreme Court posed two inquiries. First, what standard of judicial review is applicable to this case and, second, does the program at issue meet the requirements of the applicable test? 18 Cal.3d at 49.

As to the first inquiry, the court below recognized that the rights granted by the Fourteenth Amendment are personal rights and are guaranteed to in-

[51] For the trial court finding, see R. 388.

dividuals, not groups. 18 Cal.3d at 47 & n.11, and 51. The court further noted that:

> ". . . classification by race is subject to strict scrutiny, at least where the classification results in detriment to a person because of his race. In the case of such a racial classification, not only must the purpose of the classification serve a 'compelling state interest,' but it must be demonstrated by rigid scrutiny that there are no reasonable ways to achieve the state's goals by means which impose a lesser limitation on the rights of the group disadvantaged by the classification. (*E.g., Dunn v. Blumstein* (1972) 405 U.S. 330, 342-343; *Loving v. Virginia* (1967) 388 U.S. 1, 11; *McLaughlin v. Florida* (1964) 379 U.S. 184, 192-193.)" 18 Cal.3d at 49.

In adopting this standard, the California Supreme Court flatly rejected petitioner's argument that racial discrimination which is designed to aid minority groups, but which at the same time injures persons such as Bakke, is not subject to "strict scrutiny":

> ". . . we do not hesitate to reject the notion that racial discrimination may be more easily justified against one race than another, nor can we permit the validity of such discrimination to be determined by a mere census count of the races." 18 Cal.3d at 50 (footnote omitted).

The court below then arrived at the critical question of whether petitioner's special admission program met the two requirements of the strict scrutiny test—
62 (1) the presence of a "compelling state interest" and
(2) a means that is strictly necessary to promote such

an interest. It should be noted that "compelling state interest" in this instance is not synonymous with the general recognition of an important social goal, but rather, with that *degree* of importance which would justify overcoming our traditional abhorrence of racial discrimination.[32]

On this issue the parties offered conflicting arguments. In support of the quota, the University asserted an interest in integrating the Davis Medical School and the medical profession. The University also claimed it was attempting to establish role models for younger minority persons and that the program would produce minority doctors who would bring increased health care to minority communities. The University further asserted that minority patients would have greater rapport with doctors of their own race. 18 Cal.3d at 52-53.

Bakke, on the other hand, argued that no evidence in the record showed that any of the school's goals

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[32]Many of the briefs amicus curiae in support of petitioner ignore this aspect of the "compelling state interest" concept. *E.g.*, Brief of Puerto Rican Legal Defense and Education Fund and Aspiro of America as Amicus Curiae at 15-23; Brief of the Association of American Law Schools as Amicus Curiae at 39-62.

This Court has found a basis for sanctioning racial discrimination in only two cases. In Korematsu v. United States, 323 U.S. 214 (1944) and in Hirabayashi v. United States, 320 U.S. 81 (1943), the Court upheld military exclusion and curfew orders directed against American citizens of Japanese origin. In view of the widespread criticism of these cases, it is not clear that even the threat of invasion, espionage, and sabotage would justify these racially discriminatory orders were they to be reviewed by a present-day court. *See* Hobson v. Hansen, 269 F.Supp. 401, 507, n.197 (D.D.C. 1970); Rostow, *The Japanese-American Cases —A Disaster*, 54 Yale L.J. 489 (1945); W. Bean, CALIFORNIA: AN

were constitutionally "compelling". Bakke further argued that the Fourteenth Amendment does not embody the concept that societal advancement shall be based upon racial proportionality; that there is no guarantee that any individual or group will be represented in a given professional school or in a given profession. The key to equal protection of the laws, Bakke argued, is that no one—himself included—should be *denied* the opportunity to advance because of race. *Cf. Hughes v. Superior Court*, 339 U.S. 460, 464 (1950).[53]

Bakke pointed out that the only evidence in support of the program was the Declaration of George H. Lowrey, M.D., Chairman of the Admission Committee, and that nowhere in the declaration did Dr. Lowrey demonstrate the "compelling" nature of the University's goals.[54]

[53] In *Hughes*, this Court upheld the right of a state to ban picketing, the purpose of which was to compel a store to hire Blacks in proportion to Black customers. The Court said: "To deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on throughout the whole gamut of racial and religious concentrations in various cities." 339 U.S. 460, 464. The highest court of California was, and still is, of the same opinion. Hughes v. Superior Court, 32 Cal.2d 850 (1948); 18 Cal.3d at 62, n.33.

[54] *See* R. 61-72. Dr. Lowrey noted only that "[t]he diversity which comes to the medical school and the profession as a result of having students and doctors from minority backgrounds benefits both minorities and non-minorities." R. 68. He stated that

The California Supreme Court found it unnecessary to resolve the differences between the parties on this point. The court below assumed *arguendo* that certain of the University's objectives were compelling and then proceeded to consider whether petitioner had satisfied its burden of demonstrating that the instant racial quota was strictly necessary to promote such goals."

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non-minority persons "will be influenced and enriched" by their contact with the special admittees. *Id.*

Regarding the overall effect of such "benefits" and "influences", Dr. Lowrey offered only his personal speculation. He noted that non-minority persons "*may* be enlisted in meeting the [medical needs] of the minority community." *Id.* (emphasis added). He cited no data to support this hypothesis.

Regarding the furnishing of minority physicians who will aid in bringing increased medical care to the various minority communities, Dr. Lowrey stated that minority physicians are best fitted to treat patients of their particular race and concluded, "*it is hoped* that many of them will return to practice medicine in areas which are presently in great need of doctors". *Id.* (emphasis added). Again, he cited no supporting data.

Indeed, Dr. Lowrey seemed uncertain about the validity of the program. "It may" work to integrate the school and the profession; "it is hoped" that the quota will aid in bettering health care in minority communities. Dr. Lowrey's personal views are the only "evidence" tendered by the University in support of the quota.

"The court below flatly rejected certain of petitioner's claims, such as the University's assertion that minority individuals would have a greater rapport with doctors of their own race and that Black doctors would have a greater interest in treating diseases prevalent among Blacks. "The record contains no evidence to justify the parochialism implicit in the latter assertion; and as to the former, we cite as eloquent refutation to racial exclusivity the comment of Justice Douglas in his dissenting opinion in *DeFunis*: 'The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans. . . .'" 18 Cal.3d at 53.

The court found that petitioner failed to carry this burden:

> "We may assume arguendo that the remaining objectives which the University seeks to achieve by the special admission program meet the exacting standards required to uphold the validity of a racial classification insofar as they establish a compelling governmental interest. Nevertheless, we are not convinced that the University has met its burden of demonstrating that the basic goals of the program cannot be substantially achieved by means less detrimental to the rights of the majority.
>
> The two major aims of the University are to integrate the student body and to improve medical care for minorities. In our view, the University has not established that a program which discriminates against white applicants because of their race is necessary to achieve either of these goals." 18 Cal.3d at 53.[36]

In this context, the state supreme court noted that there was no prior history of racial discrimination at the Davis Medical School. Relying upon this Court's recent decision in *Washington v. Davis,* 426 U.S. 229

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[36]The Washington Supreme Court applied the same test in *DeFunis*, 82 Wash.2d 11, 32, 507 P.2d 1169, 1182 (1973). In Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d, 537, 384 N.Y.S.2d 82 (1976), the New York Court of Appeals indicated in dicta that it would apply a similar rule. The *Alevy* court noted that:

> ". . . [W]here preference policies are indulged, the indulgent must be prepared to defend them. . . .
>
> ". . . [T]o be [constitutional], it must be shown that a substantial interest underlies the policy and practice and, further, that no nonracial, or less objectionable racial, classifications will serve the same purpose." 39 N.Y.2d at 336-337, 348 N.E.2d at 546, 384 N.Y.S.2d at 90.

(1976), the court below rejected the argument of several amici that the University had previously excluded minority students. "The fact that minorities are underrepresented at the University would not suffice to support a determination that the University had discriminated against minorities in the past." 18 Cal.3d at 59; *see generally Id.* at 57-60; *see also Dayton Board of Education v Brinkman*, 45 U.S.L.W. 4910, 4913 (U.S. June 27, 1977). Petitioner itself makes the point more forcefully:

> "While there may be some point in arguing intentional discrimination where it has existed, in this case it is simply not possible. There has been no intentional discrimination by the Davis Medical School. The school opened only eight years ago, and very soon thereafter began to fashion the Task Force program." Petitioner's Reply Brief for Certiorari at 6.

The California Supreme Court also commented on possible alternatives to the quota. The examples were not offered as guaranteed solutions, but were presented to demonstrate that the University had failed to carry its burden of proof. "So far as the record discloses, the University has not considered the adoption of these *or other* non-racial alternatives to the special admission program." 18 Cal.3d at 55 (emphasis added)."

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[57]Petitioner misses the point when it argues that the instant quota is the most direct means to achieve the school's goals. The most direct means are not always constitutional, particularly when they negate constitutionally protected rights. Dunn v. Blumstein, 405 U.S. 330, 342-343 (1972); Shapiro v. Thompson, 394 U.S. 618, 631 (1969); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

C. The Decision Below Does Not Require A Return To "All White" Professional Schools.

Petitioner blandly asserts that the court below has sanctioned the abandonment of minority students and has called for virtually "all-white professional schools at the major universities of this country." Petition for Certiorari at 4.[58] Petitioner, however, has attempted no means other than the instant racial quota to achieve its stated goals. It claims that if the quota is deemed unconstitutional, it will be unable to find another solution and that its medical school will be closed to minority enrollment.[59] In so arguing, Petitioner grossly misconstrues the opinion of the California Supreme Court.

The University has neither been empowered to discriminate against minority persons, nor constrained to judge applicants for admission solely on the basis of objective criteria such as grades and test scores. The court below encouraged the University to use flexible standards in its admission procedure and stated clearly that the University could, and should, consider the "disadvantaged" situations of its applicants. 18 Cal.3d at 55. The consideration of such factors as the economic or educational deprivation of a medical school applicant is not constitutionally infirm; but its greater merit is that it directly relates to the problem of overcoming prior personal hard-

[58] *See also* Brief for Petitioner at 13-17; Petitioner's Reply Brief for Certiorari at 9.

[59] According to petitioner, if the judgment below is affirmed, the medical school ". . . would simply shut down [its] special admission [program]." Brief for Petitioner at 14.

ship.[60] The only limitation placed on the University is one consistent with the Constitution and previous decisions of this Court; namely, that the University cannot employ race as the yardstick, or racial discrimination as the mechanism, for deciding who may attend the Davis Medical School. Surely it is not credible that so great a University cannot summon the will to engage in the experimentation urged by California decision or, if so inclined, would lack the ingenuity and resources to pursue new alternatives in a constructive and successful manner.

D. The Court Below Rejected the Use of a Racial Quota to Govern Admission to Professional School.

The California Supreme Court was sensitive to the complicated nature of this case and exercised great care in reviewing the conflicting constitutional arguments. It was only after careful analysis that the court below rejected petitioner's quota system.

> ". . . [T]he ends sought by such programs are clearly just if the benefit to minorities is viewed in isolation. But there are more forceful policy reasons against preferential admissions based on race. . . . Perhaps most important, the principle

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[60] The University apparently did not consider, for example, the implementation of a racially neutral pre-application program designed to allow potential applicants who are disadvantaged the opportunity to acquire the various skills required for a medical education. Brief for Petitioner at 28-43; *Cf.* Milliken v. Bradley, 45 U.S.L.W. 4873, 4878-4879 (U.S. June 27, 1977).

With respect to an admission program which is based, in part, upon the concept of allowing applicants credit for overcoming "disadvantage", see LAW SCHOOL ADMISSIONS: A REPORT TO THE ALUMNI(AE), 123 CONG. REC. H3539 (daily ed. Apr. 25, 1977). The report was presented by Peter J. Liacouras, Dean of the Temple University School of Law.

that the Constitution sanctions racial discrimination against a race—any race—is a dangerous concept fraught with potential for misuse in situations which involve far less laudable objectives than are manifest in the present case.

". . . No college admission policy in history has been so thoroughly discredited in contemporary times as the use of racial percentages. Originated as a means of exclusion of racial and religious minorities from higher education, a quota becomes no less offensive when it serves to exclude a racial majority. 'No form of discrimination should be opposed more vigorously than the quota system.' (McWilliams, A MASK FOR PRIVILEGE (1948) p. 238.)

"To uphold the University would call for the sacrifice of principle for the sake of dubious expediency and would represent a retreat in the struggle to assure that each man and woman shall be judged on the basis of individual merit alone, a struggle which has only lately achieved success in removing legal barriers to racial equality." 18 Cal.3d at 61-63 (footnotes omitted).[21]

The conclusions of the court below should not be taken lightly. They reflect a reasoned application of

[21] A growing number of courts around the country have recently expressed the same view. *E.g.*, Hupart v. Board of Higher Education, 420 F.Supp. 1087 (S.D.N.Y. 1976); Flanagan v. President and Directors of Georgetown College, 417 F.Supp. 377 (D.D.C. 1976); Lige v. Town of Montclair, 72 N.J. 5, 367 A.2d 833 (1976); Podberesky v. Lindsay, 39 N.Y.2d 611, 350 N.E.2d 595, 385 N.Y.S. 2d 265 (1976); *cf.* State Department of Administration v. Department of Industry, Labor and Human Relations, 76 Wis.2d ...., 252 N.W.2d 353 (1977). It is interesting to note that the Washington Supreme Court itself recently indicated that racial preferences are not proper. *See* Puget Sound Gillnetters Ass'n v. Moos, 88 Wash.2d 677, ... P.2d ..... (1977).

the previous decisions of this Court, and deal with the problems presented by this case in a considered, practical and wise manner.

CONCLUSION

Allan Bakke's strong academic record, his professional engineering experience, his volunteer service in a hospital emergency room, his extraordinary efforts to complete a pre-medical education and other relevant factors demonstrate his unquestioned aptitude and strong personal desire to become a physician. Petitioner's racial quota, however, prevented Bakke from competing for 16 of the 100 places at the Davis Medical School and, as a result, barred him—by reason of race alone—from attending the school. Petitioner through this unlawful discrimination violated Bakke's right to the equal protection of the laws and on the record of this case it is clear that Bakke was entitled to an order directing his admission.

The California Supreme Court recognized, and rightly condemned, the evil inherent in petitioner's quota system. At the same time, the court below granted to petitioner the broad discretion to search for alternate measures that do not violate constitutional rights. Such a decision is a sensitive response to this complicated issue and, given the grave constitutional implications of a preferential racial quota system, represents the sound exercise of judicial wisdom.

For these and the other reasons set forth in this brief, the judgment of the Supreme Court of California should be affirmed.

Respectfully submitted,
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Dated, August 2, 1977.

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